Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSEPH CATALDO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL G. SMITH, ESQUIRE
Fla. Bar No. 265802
Lead Counsel of Record
633 Southeast 3rd Ave.
Suite 4-F
Ft. Lauderdale, FL 33301
Phone: (954) 764-0033
Fax: (954) 764-2590

JOHN F. O'DONNELL, ESQUIRE
Fla. Bar No. 264891
Additional Counsel
2648 N.E. 26th Place
Ft. Lauderdale, FL 33306
Phone: (954) 563-9993
Fax: (954) 563-9995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MR. CATALDO'S MOTIONS FOR MISTRIAL AND LATER FOR A NEW TRIAL WHERE THE GOVERNMENT'S OPENING STATEMENT AND CERTAIN EVIDENCE EXPOSED THE JURY TO IMPROPER AND INFLAMMATORY COMMENT AND EVIDENCE REGARDING HIS UNCHARGED NARCOTICS TRAFFICKING AND PERSONAL USE.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

JOSEPH CATALDO, defendant and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in this proceeding in Case No. 97-5509 of that Court on May 18, 1999, affirming the conviction entered in the United States District Court for the Southern District of Florida.

OPINION BELOW

The judgment of the United States Court of Appeals, Eleventh Circuit, *United States v. Joseph Cataldo*, Case No. 97-5509, is contained in a reported Opinion, 171 F.3d 1316 (11th Cir. 1999), affirming the conviction of Petitioner. A copy of the Opinion rendered is included in the Appendix at the end of this Petition. A copy of the initial Judgment In A Criminal Case, United States District Court, Southern District of Florida, sentencing Petitioner to 108 months is also included in the Appendix. Although the Eleventh Circuit Opinion reversed the District Court on a sentencing issue, and although, following the remand, the district court subsequently resentenced Petitioner to 96 months, rather than, 108 months, those issues are not presented for review here.

JURISDICTION

This Honorable Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 and pursuant to Supreme Court Rules 10.1(a) and (c), and Rule 13(.1) and (.4). The United States Court of Appeals for the Eleventh Circuit entered its judgment on April 8, 1999. Petitioner timely filed a Petition for Rehearing, which the Eleventh Circuit denied on May 18, 1999. Pursuant to Rule 13.1 and Rule 13.3 of the Supreme Court Rules, this petition is timely filed within 90 days after the denial of the Petition for Rehearing filed by Petitioner.

CONSTITUTIONAL PROVISION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

JOSEPH CATALDO, the petitioner, seeks this extraordinary relief from the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the conviction and sentence before the Honorable Norman C. Roettger, United States District Court Judge for the

Southern District of Florida. Petitioner directly appealed his conviction and sentence to the Eleventh Circuit Court of Appeals. Jurisdiction was conferred by Title 28, U.S.C. § 1291.

Mr. Cataldo was charged by superseding indictment in the Southern District of Florida with conspiracy to import cocaine (Count I); conspiracy to possess with intent to distribute cocaine (Count II); possession with intent to distribute cocaine on August 10, 1994 (Count III); and, possession with intent to distribute cocaine on June 15, 1995 (Count IV).[1] He pled not guilty to all charges. Following a jury trial, Mr. Cataldo was found not guilty of Counts II and III, but guilty of Counts I and IV.

Mr. Cataldo filed a Motion for New Trial arguing, *inter alia*, that prosecutorial comment and evidence regarding uncharged prior drug dealings between Mr. Cataldo and the government's main witness, informant Mario Adamo, which had been the subject of defense objections and motions for mistrial during trial, prejudiced his trial. The district court summarily denied this Motion.

On August 22, 1997, Cataldo was sentenced to a term of 108 months imprisonment, followed by a five (5) year term of supervised release.

On April 8, 1999, the United States Court of Appeals for the Eleventh Circuit issued its published Opinion

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[1] The superseding Indictment charged Mr. Cataldo with co-defendant George French. This Indictment replaced an initial Indictment which additionally charged co-defendant James Boleman. Both French and Boleman pled guilty and, in exchange for substantial sentencing concessions, testified for the government at trial.

affirming the conviction but reversing the sentence of the Petitioner in a direct appeal of a final decision of a United States District Court (Title 28, U.S.C. § 1291).

Petitioner timely filed a Petition for Rehearing, which the Eleventh Circuit denied on May 18, 1999. Therefore, this Petition is timely filed.

REASON FOR GRANTING THE WRIT

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MR. CATALDO'S MOTIONS FOR MISTRIAL AND LATER FOR A NEW TRIAL WHERE THE GOVERNMENT'S OPENING STATEMENT AND CERTAIN EVIDENCE EXPOSED THE JURY TO IMPROPER AND INFLAMMATORY COMMENT AND EVIDENCE REGARDING HIS UNCHARGED NARCOTICS TRAFFICKING AND PERSONAL USE.

Petitioner submits that it was a clear abuse of the district court's discretion in denying first, two separate Motions for Mistrial made during trial, and second a Motion for New Trial based on the government's argument and introduction of evidence regarding the defendant's uncharged misconduct. *See, e.g., Huddleston v. United States,* 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed. 2d 771 (1988); *United States v. Chirinos,* 112 F.3d 1089, 1097-98 (11th Cir. 1997); *United States v. Jones,* 28 F.3d 1574, 1580 (11th Cir. 1989), *vacated on other grounds,* 116 S.Ct. 501 (1995), *modified on other grounds,* 74 F.3d 275 (11th Cir. 1996).

The jury was improperly exposed to highly inflammatory comment and evidence regarding Mr. Cataldo's

alleged, uncharged prior drug dealings and personal use of cocaine. These references were not inextricably intertwined with the government's evidence regarding the charged offenses. Although the district court gave cursory curative instructions following t /o of these instances, the references were not isolated and could not be adequately cured by the court's instructions. Moreover, the evidence in this case was close as demonstrated by the jury's not guilty verdicts on two of the four counts. Accordingly, there is at least a reasonable possibility that the improper comment and evidence prejudiced Mr. Cataldo.

A. Trial Proceedings

Within moments of the beginning of the government's opening statement, the prosecutor tarred Mr. Cataldo through his highly inflammatory assertion that Mr. Cataldo had done prior drug deals with informant Mario Adamo, the government supplied hub of the charged conspiracy. The district court recognized the particularly inflammatory nature of this assertion in the context of the government's drug conspiracy allegations, and sustained Mr. Cataldo's objection. The court further admonished the government "not to make any further reference in opening statement to any drug deals with anybody else for personal use or anything like that. The government has to win its case, if they can on the evidence received." Although the court acknowledged that the government might be able to introduce some such evidence at trial, it cautioned that it would only be allowed to do so if it could demonstrate "before it comes out" that such evidence was "inextricably intertwined" with the evidence

regarding the charged offenses. Nonetheless, the court denied Mr. Cataldo's motion for a mistrial. Instead, it offered a cursory instruction "to disregard the last statement of the government."

The government's inflammatory assault upon Mr. Cataldo's character continued during its examination of informant Adamo. There, in responding to a question regarding Mr. Cataldo's "use [of] the word 'cocaine' ", Adamo declared: "Cataldo not only used the word cocaine but he used to ask me for some cocaine for his personal use." This time the court overruled Mr. Cataldo's timely objection accepting, instead, the government's assertion that this evidence was "inextricably intertwined with its evidence on the charged offenses." Although the court directed the jury to "disregard the comment about personal use," it denied Mr. Cataldo's motion for mistrial.

B. Impropriety of Comment and Evidence

The admissibility of uncharged acts is generally governed by Federal Rule of Evidence 404(b). This Rule provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith". It does permit introduction of such evidence for other limited purposes, including to prove motive, opportunity, intent, and knowledge, but then only if, upon request by the accused, the prosecution has provided reasonable notice in advance of trial, or during trial if for good cause shown, of the general nature of any such evidence it intends to introduce.

Moreover, prosecutorial comment on a defendant's uncharged acts is also improper and prohibited. *See, e.g., United States v. LeQuire*, 943 F.2d 1554, 1568-71 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 3037 (1992); *United States v. Penass*, 997 F.2d 1227, 1230 (7th Cir. 1993) (prosecutor's discussion in closing argument of defendant's uncharged crimes "was wholly inappropriate"), *cert. denied*, 114 S.Ct. 458 (1993); *United States v. Foster*, 982 F.2d 551, 555 (D.C. Cir. 1993) (no basis in record for prosecutor's remarks regarding defendant's prior drug dealing and use and no apparent purpose for comments other than to prejudice jury). Such comments are likewise improper in opening statements. *See, e.g., United States v. Novak*, 918 F.2d 107 (10th Cir. 1990) (conviction reversed based, in part, upon prosecutor's unsubstantiated statements regarding uncharged misconduct during opening statements).

In response to Mr. Cataldo's trial objections, the government specifically renounced any reliance upon Rule 404(b) to justify admission of Mr. Cataldo's purported prior drug dealings with informant Adamo, acknowledging that it never gave Mr. Cataldo the requisite pre-trial notice. Instead, the government argued, and the district court agreed, that Mr. Cataldo's purported prior drug trafficking and personal cocaine use were "inextricably intertwined" with the government's evidence regarding the charged offenses. *See, e.g., United States v. Utter*, 97 F.3d 509 (11th Cir. 1996)

The category of evidence that is admissible because it is "inextricably intertwined" with proof of pending charges is very limited. *United States v. Mays*, 822 F.2d 793, 797 (8th Cir. 1987). Evidence claimed to be inextricably intertwined is not admissible unless excluding it

"would have left a chronological or conceptual void in the story or ordeal." *United States v. Swiatek*, 819 F.2d 721, 727 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 245 (1987). As the Eleventh Circuit stated in *United States v. Richardson*, 764 F.2d 1514, 1522 (11th Cir.), *cert. denied*, 474 U.S. 952 (1985): "the testimony would have been confusing and incomplete without mention of the prior acts." *Accord United States v. Fortenberry*, 971 F.2d 717, 721 (11th Cir. 1992) ("an essential part of the chain of events explaining the context . . . necessary to complete the story of the crime for the jury"), *cert. denied*, 113 S.Ct. 1020 (1993); *United States v. Foster*, 889 F.2d 1049, 1053 (11th Cir. 1989) (evidence that forms "integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted"); *United States v. Leichtman*, 742 F.2d 598, 604 (11th Cir. 1984) (prior acts evidence was *necessary* to complete the story); *United States v. Males*, 715 F.2d 568, 571 (11th Cir. 1983) (rejecting argument for reversal because inextricably intertwined evidence was *necessary*); *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979) (testimony would have been incomplete and confusing without other acts evidence and would have detracted from search for truth).

Clearly, in the instant case, there was not "necessity" for the government to comment upon, or introduce evidence about, Mr. Cataldo's alleged prior drug dealings with Adamo or his personal use of cocaine. The evidence of Adamo and Cataldo's long time acquaintanceship and mutual professional interest in the hospitality industry (over 25 years) reasonably explained their renewed relationship in 1994. Omitting the reference to prior drug dealings and use would not have left "a chronological or

conceptual void of the story or ordeal." Omitting the prosecutor's comment and the offending testimony would neither have been confusing nor have rendered the evidence offered against Mr. Cataldo incomplete. The uncharged misconduct asserted by the government was not an essential part of the chain of events explaining the context of the charged offenses. Accordingly, neither the prosecutor's comment nor Adamo's testimony were proper under this theory.

Finally, calling such evidence "inextricably intertwined" does not remove such evidence from the strict requirements of Rule 404(b). Such argument and evidence still relate to the subject of uncharged misconduct, *see Huddleston v. United States, supra,* which is almost always prejudicial to the defendant. Since none of the evidence or argument was offered for a proper purpose or otherwise relevant, both Rules 403 and 404(b) required their exclusion.

C. Prejudice Resulting from Comment and Evidence of Uncharged Misconduct.

Given the impropriety of the prosecutor's opening statement and the gratuitous statement of informant Adamo, the question remains whether the improper comment and evidence prejudiced Mr. Cataldo. As this Court has held: the test to apply is whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction". *See, Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967). *See, also, United States v. Ruz-Salazar,* 764 F.2d 1433 (11th Cir. 1985), reversal is warranted "if there is a

significant possibility that [the improper comment and evidence] had a substantial impact on the jury's verdict. . . . " *Id.* at 1437 (citation omitted).

One factor to consider in determining prejudice is the curative measures that were taken by the court. In the instant case, following the two improper references to uncharged misconduct, the district court advised the jury to disregard the references.

Although we generally place great trust in a jury's ability to follow a trial judge's instruction to disregard improper comment or evidence, when the evidence concerns a defendant's alleged prior drug trafficking and personal use of drugs in the context of a narcotics conspiracy case, this presumption simply cannot carry the day. Under these circumstances, "[t]he naïve assumption that prejudicial affects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewith v. United States*, 336 U.S. 440, 443, 69 S.Ct. 1716, 1723 (1949) (Jackson, J., concurring). As Judge Gewin observed in *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962): "[O]ne cannot un-ring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Id.* at 886. Stated differently, under these circumstances, "a drop of ink cannot be removed from a glass of milk." *Government of Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1976).

In *United States v. LeQuire*, 943 F.2d 1554 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 3037 (1992), the Eleventh Circuit also recognized the inadequacy of jury instructions to cure prejudice resulting from improper comment

or evidence, where there were repeated instances of prosecutorial misconduct: "While it is true that instructions from the bench can cure isolated instances of prosecutorial misconduct, there are some matters that cannot be removed by curative instructions; five instances reflecting on the character of [the defendant] is more than enough to fall into the latter category." *Id.* at 1571. Here, not only did the prosecution commit three misconduct-related errors, as set forth above, the district court also sustained at least five separate argumentative objections during the prosecutor's cross-examination of Mr. Cataldo.

Thus, the comment and evidence regarding Mr. Cataldo's alleged uncharged prior drug dealings with informant Adamo and personal use of cocaine were not isolated incidents. If the jury had forgotten the matter following the judge's curative instruction during opening statements, it was reminded of this highly inflammatory allegation during Adamo's testimony. Clearly, the judge had warned the prosecutor to seek permission to introduce any such evidence after the surprise reference in the prosecutor's opening statement. Had the prosecutor related this warning to each of the government's witnesses, it could have prevented Adamo's improper and inflammatory testimony. Adamo made a further improper statement during cross-examination when he gratuitously added to one of his answers "Me and Joe[Cataldo] in fact did a lot of drug business before." Although this statement was not the subject of a motion to strike it certainly added to the improper assault upon Mr. Cataldo's character that was leveled by the government in this case. This slur against Mr. Cataldo, unmitigated by any curative

instruction, once again reminded the jury of the uncharged allegations against him. Thus, because these references to the alleged uncharged acts were not isolated, but instead were repeated, the court's cursory instructions were ineffectual in curing the taint.[2]

Where the evidence is based substantially on testimony of any immunized or cooperating witness, reversal is more likely appropriate. *See, e.g., Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied*, 490 U.S. 1012 (1989); *United States v. Boroni*, 758 F.2d 222, 225 (7th Cir. 1985). Similarly, when a case boils down to a credibility choice between defense witnesses and government witnesses, error is less likely harmless. *See, e.g., United States v. Lail*, 846 F.2d 1299 (11th Cir. 1988); *United States v. Whaley*, 781 F.2d 417, 421 (5th Cir. 1986).

The government's case against Mr. Cataldo was hardly overwhelming and depended precariously on the jury's acceptance of the testimony of the government's informants and cooperating defendants and its rejection of Mr. Cataldo's testimony. The most convincing testimonial of the closeness of the call the jury made was its not guilty verdicts on counts II and III. By these verdicts

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[2] Following Adamo's gratuitous remark that Mr. Cataldo had used cocaine in the past, Mr. Cataldo admitted during his testimony that he had used cocaine three times with Mr. Ceccoli no more recently than four or five years ago. This very narrow admission does not render harmless Adamo's sprawling implication that Mr. Cataldo routinely used cocaine. Additionally, Cataldo's statement during cross-examination cannot be deemed to have shadowed the improper comment and testimony regarding his alleged, uncharged prior drug trafficking.

the jury necessarily rejected a large portion, if not the core, of the government's informant and cooperating defendant testimony and accepted the testimony of Mr. Cataldo. Mr. Cataldo's testimony explained, and was consistent with, the numerous exculpatory aspects of the government's tape recordings. Thus, it cannot be stated with any reasonable certainty that absent the damning improper comment and evidence regarding Mr. Cataldo's alleged, uncharged prior narcotics dealings, the jury would have returned the same guilty verdicts regarding counts I and IV. Under all of these circumstances, there is, at least, a reasonable possibility that fair-minded jurors might very well have returned not guilty verdicts as to those counts but for the government's impermissible injection of evidence and comments concerning uncharged misconduct into Mr. Cataldo's trial. *See, Chapman v. California, supra.* Accordingly, his convictions must be reversed.

CONCLUSION

WHEREFORE, based upon the above-cited precedents and arguments, and for each of the foregoing reasons, the Petitioner, JOSEPH CATALDO, respectfully prays that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

MICHAEL G. SMITH, ESQUIRE
Fla. Bar No. 265802
Lead Counsel of Record
633 Southeast 3rd Ave.
Suite 4-F
Ft. Lauderdale, FL 33301
Phone: (954) 764-0033
Fax: (954) 764-2590

JOHN F. O'DONNELL, ESQUIRE
Fla. Bar No. 264891
Additional Counsel
2648 N.E. 26th Place
Ft. Lauderdale, FL 33306
Phone: (954) 563-9993
Fax: (954) 563-9995

Dated: August 16, 1999

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UNITED STATES of America, Plaintiff-Appellee,

v.

Joseph CATALDO, Defendant-Appellant.

No. 97-5509.

United States Court of Appeals,
Eleventh Circuit.

April 8, 1999.

Alan S. Ross, Benjamin S. Waxman, Miami, FL, for Defendant-Appellant.

Thomas E. Scott, U.S. Atty., Adalberto Jordan, Evelio J. Yera, Carol Herman, Asst. U.S. Attys., Miami, FL, Thomas P. Lanigan, Asst. U.S. Atty., Ft. Lauderdale, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONDSON, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Defendant appeals his convictions and sentences for conspiracy to import cocaine and possession with intent to distribute cocaine. We affirm defendant's convictions. Because the Government did not present sufficient evidence to support an obstruction-of-justice enhancement, we vacate the sentences imposed by the district court and remand for resentencing.

Background

In June 1994, confidential informant Mario Adamo[1] contacted defendant Joseph Cataldo and asked Cataldo if he knew of potential buyers or sellers of cocaine. Adamo told Cataldo that he would pay Cataldo a one- or two-thousand-dollar commission for each kilogram of cocaine that Adamo bought or sold. Cataldo later introduced Adamo to Bill Ceccoli and George French for the purpose of arranging possible cocaine transactions. Cataldo told Adamo that Ceccoli and French had connections in Belize that would be useful for obtaining cocaine.

In July and August, Adamo and Ceccoli discussed the possibility of importing hundred-kilogram quantities of cocaine into Florida. Cataldo told Ceccoli that, in the meantime, Adamo was interested in selling a smaller amount of cocaine. Adamo and Ceccoli later agreed to a small-scale transaction. That transaction took place in August 1994, when Ceccoli paid an undercover agent, posing as a seller, $30,000 for two kilograms of cocaine. After Ceccoli left with the cocaine, he was stopped by law enforcement agents monitoring the transaction. The agents confiscated the cocaine without Ceccoli's knowledge but did not arrest Ceccoli. Ceccoli believed the cocaine had been stolen; he then contacted Cataldo, who told Ceccoli that Cataldo would speak to Adamo about the situation.

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[1] Adamo was a convicted narcotics trafficker cooperating with the DEA. Adamo had known defendant Joseph Cataldo for years before the events at issue in this case occurred.

In August and September of 1994, Adamo, Ceccoli, French, and an undercover agent discussed the importation of between 100 and 600 kilograms of cocaine from Belize. Cataldo was present for some of the discussions; and, at one point, he was told by Ceccoli that he could receive an additional commission from Ceccoli for the transactions. The plan ultimately failed because French and Ceccoli were unable to locate a source of cocaine at the terms and quantities they required.

In June 1995, French asked Cataldo to put him in touch with Adamo again because French wanted to buy a kilogram of cocaine. Cataldo arranged for French to meet with Adamo at the hotel where Cataldo was staying. The transaction took place; and afterwards, law enforcement agents again seized the cocaine. French contacted Cataldo and told him that the cocaine had been taken. Cataldo agreed to attempt to recover the cocaine or the money. Cataldo thereafter spoke several times with Adamo and made threats against Adamo, whom he believed had set up French and also Ceccoli.

In January 1996, Cataldo was charged by superseding indictment with, among other crimes, conspiracy to import cocaine in violation of 21 U.S.C. §§ 952(a) & 963 (Count I),[2] and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C.

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[2] The indictment charged that "Joseph Cataldo, George French, and James R. Boleman knowingly and intentionally combined, conspired, confederated and agreed with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute and to distribute . . . cocaine. . . ."

§ 2 (Count IV). Cataldo pleaded not guilty. He was convicted on Counts I and IV.

At sentencing, Cataldo sought a mitigating-role reduction in his base-offense level. The district court found that Cataldo's role in the offense did not entitle him to a reduction. The court also found, over Cataldo's timely objection, that Cataldo had failed to report his full arrest record to the probation officer, who had prepared Cataldo's Presentence Investigation Report ("PSI"), thereby warranting an obstruction-of-justice enhancement. The court sentenced Cataldo within the applicable Guidelines range to concurrent terms of 108 months' incarceration on Counts I and IV.

Discussion

On appeal, Cataldo challenges both his convictions and his sentences. Only the sentencing arguments warrant discussion.

I.

Cataldo contends that the district court erred in refusing his request for a reduction of his offense level based on his minimal or minor role in the offense. Section 3B1.2 of the Sentencing Guidelines, "Mitigating Role," designates a range of downward adjustments for a defendant whose role in committing the offense makes him "*substantially* less culpable than the average participant." U.S.S.G. § 3B1.2, background (1998) (emphasis added). The Guidelines state that a defendant's offense level may

be decreased by four levels if he was a "minimal participant"[3] in the criminal activity, reduced by two levels if he was a "minor participant"[4] in the criminal activity, and reduced by three levels if his role fell somewhere in between. U.S.S.G. § 3B1.2.

At sentencing, the Government characterized Cataldo as a drug broker (bringing buyers and sellers together) and argued that Cataldo should receive a two-level aggravating-role enhancement pursuant to section 3B1.1(c). Cataldo argued that he was entitled to a mitigating-role reduction. The court determined that neither an enhancement nor a reduction was warranted, explaining:

> On his role in the offense it strikes me that he was more than a mere broker. But the Government has testified that his role was that of a broker.
>
> And a broker is – in drug deals there is always a danger of over generalization. But they almost never have an aggravating role of being an organizer, leader, supervisor or manager.
>
> But they also never have a[ ] minor role or a minimal role.
>
> They are a classic example of somebody who deserves whatever the standard level is in

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[3] A minimal-role reduction is intended to be used infrequently, U.S.S.G. § 3B1.2, comment. (n.2), "to cover defendants who are plainly among the least culpable of those involved in the conduct of a group," U.S.S.G. § 3B1.2, comment. (n.1).

[4] "[A] minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3).

> the sense that they don't get any increase in levels and they don't get any decrease in levels.
>
> I see nothing in the circumstances of this case to depart either upward or downward in the determination of the levels.

On appeal, Cataldo contends that the district court erred by applying a per se rule excluding brokers from being eligible for a mitigating-role adjustment.[5] Cataldo also argues that, given the facts of this case, he is entitled to a reduction based on both his lack of knowledge of the scope of the conspiracy and on his role in relation to his coconspirators.

—The defendant bears the burden of proving by a preponderance of the evidence that he is entitled to a mitigating-role reduction. *United States v. Gates*, 967 F.2d 497, 501 (11th Cir.1992). We review the district court's determination of a defendant's role in the offense for clear error. *United States v. Garrison*, 133 F.3d 831, 843 (11th Cir.1998).

Cataldo is correct that application of section 3B1.2 requires an inquiry into the specific facts of the case. *See* U.S.S.G. § 3B1.2, background (stating that section 3B1.2 determination is "heavily dependent upon the facts of the particular case"); *see also United States v. Veloza*, 83 F.3d 380, 382 (11th Cir.1996) ("[T]ransporting illegal drugs, in and of itself, cannot, as a matter of law, preclude a

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[5] To the district court, Cataldo objected to the denial of a downward adjustment but did not specifically object on the ground of a per se rule having been applied. The Government has not argued that Cataldo has given up the point. So, for the sake of discussion, we have *assumed* he has preserved the point.

defendant from receiving a downward adjustment based on his role in the offense."). The Guidelines also contemplate some comparison of a defendant's conduct to that of his coconspirators. *See* U.S.S.G. § 3B1.2, comment. (nn.1 & 3) (defining "minor" and "minimal" roles in terms of defendant's conduct relative to that of his coconspirators). But, contrary to Cataldo's argument, the district court judge in this case – who had presided over the trial and listened to all the evidence – did not fail to make the necessary inquiry.

The sentencing court did not construe the Guidelines to exclude categorically drug brokers from a minor or minimal role reduction. Instead, the court articulated a kind of rough guide, which he then applied to the particular facts of Cataldo's case. The court expressly noted the "danger of over generalization" – implying that he knew to stop and was stopping short of doing that – in stating his general view of a drug broker's role. In context, we do not read the judge's remarks as allowing for no exceptions.[6] And the court ultimately made a decision based on

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[6] We cannot accept that a district judge's extemporaneous spoken words of explanation are to be read by appellate judges as if we were reading a statute. The Supreme Court has said that we are not to read even the Supreme Court's formal, written opinions that way. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."). We look at context and at the judge's acts. And we do not assume that the district judges do not know the law: their ambiguous oral statements, if possible, are interpreted to be consistent with (and not inconsistent with) the law. The last principle applies with

"the circumstances of this case," rejecting both Cataldo's application for a reduction and the Government's application for an increase. We do not understand the record to show that the sentencing court, in fact, did apply a hard-edged, per se rule in this case.

We have looked at the facts of this case. The district court did not commit clear error in refusing Cataldo a reduction. Multiple contacts existed between Cataldo and the other participants in the enterprise about the various cocaine transactions. Cataldo, introducing the coconspirators to one another, had a connection to both the source and destination of the drugs. The Government also presented evidence that Cataldo was involved, to some degree, in the large-scale importation scheme. *See United States v. Asseff*, 917 F.2d 502, 507 (11th Cir.1990) ("It is evident that defendants-appellants' conduct does not warrant a downward adjustment in sentencing because of their apparent knowledge of their criminal activity and the great amount of cocaine involved."). And he had some knowledge of other proposed and actual drug deals among the coconspirators. Cf. U.S.S.G. § 3B1.2, comment. (n.1). ("[L]ack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.") Cataldo also maintained a financial interest in the transactions.

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particular force when the district judge never had presented to him an objection aimed specially at his choice of words: the kind of objection that would have allowed him the chance to clarify his statements.

That Cataldo was less culpable than some of his coconspirators is not plain. But, even if we accept Cataldo's assertion that he had some lesser role than his coconspirators,[7] that fact alone does not necessarily warrant a role reduction in this case. *See United States v. Zaccardi*, 924 F.2d 201, 203 (11th Cir.1991) ("Although the PSI indicated that appellant was one of the 'least culpable' defendants, the district court was not obliged on that basis to determine that appellant was a 'minor' participant. . . . It is entirely possible for conspiracies to exist in which there are no minor participants [.]"). Sufficient evidence supports the court's determination that Cataldo was not entitled to a mitigating-role adjustment. The court, therefore, did not commit clear error.

II.

Cataldo contends that the district court erred in increasing his offense level two increments for obstruction of justice. The probation officer preparing Cataldo's PSI recommended the enhancement because he believed Cataldo had failed to acknowledge a 1983 "arrest" in Massachusetts for assault and battery with a dangerous weapon when asked about his arrest history. Cataldo admits that the did not mention this offense. He argues, however, that he made no false statement, because he was not arrested on the 1983 charge.[8]

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[7] Adamo testified at trial that Cataldo's role was limited to making introductions.

[8] Cataldo similarly objected to the probation officer's reliance for the obstruction-of-justice enhancement on four Florida convictions for writing worthless checks. The probation

Section 3C1.1 of the Guidelines states "If . . . the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense . . . increase the offense level by 2 levels." "[P]roviding materially false information to a probation officer in respect to a presentence . . . investigation" is a kind of conduct to which the enhancement applies. U.S.S.G. § 3C1.1, comment. (n.4(h)).

The Government has the burden of proving the applicability of a guideline section which would enhance a defendant's offense level. *United States v. Shriver*, 967 F.2d 572, 575 (11th Cir.1992). And "[w]hen a defendant challenges one of the factual bases of his sentence . . . the Government has the burden of establishing the disputed fact by a preponderance of the evidence." *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir.1995). This burden must be satisfied with "reliable and specific evidence." *Id.* Cataldo contends that the Government failed to meet its burden at sentencing because it did not prove that he was arrested on the 1983 charge.[9]

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officer did note that the cases were handled administratively (that is, without an arrest); and the court did not rely on them in applying the enhancement.

[9] Contrary to the Government's contention, Cataldo did not waive this argument. Some confusion arose during the discussion of the obstruction-of-justice enhancement. But, our review of the record reveals that all parties understood that Cataldo contested the existence of an arrest for the 1983 Massachusetts assault and battery offense, as well as for seven other Massachusetts offenses and the four Florida worthless check charges discovered by the probation officer. *See United States v. Hoffer*, 129 F.3d 1196, 1202-03 (11th Cir.1997) ("To

The PSI states that no court documentation or circumstances about the arrest were available on the 1983 offense and that the probation officer was attempting to retrieve documentation from archives. In the Addendum to the PSI, the probation officer further wrote "[t]he court records as to the defendant's 1983 arrest[ ] in Massachussetts [sic] reflect an arraignment date but not an arrest date."

At the sentencing hearing, the Government sought to prove the arrest by presenting a computer printout from the Massachusetts courts reflecting, at best, an arraignment date, a conviction and probation for the 1983 charge.[10] The court overruled Cataldo's objection to the enhancement, reasoning "[i]t strikes me that there is enough in the printout that warrants . . . a conclusion

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preserve an issue for appeal, an objection must be sufficiently detailed to allow the trial court an opportunity to correct any arguable errors before an appeal is taken.")

[10] The printout is not in the record. But, we can review this issue based on the representations made in the briefs and on the district court's statements in open court. *See United States v. Gutierrez*, 931 F.2d 1482, 1491 (11th Cir.1991). The district court commented on the printout's contents this way:

> My probation officer was showing me a printout [from] the courts in Massachusetts in connection with this assault and battery with a dangerous weapon. And the second count is a probation violation although it says, the printout says, arraignment on the same date for these offense[s], one from Salem and one from Peabody [Massachusetts.]
>
> And it doesn't contain a whole lot more information on that except it shows an award of probation.

[that Cataldo was not truthful]. . . . When you get probation, you have been arrested. Especially when you get probation for assault and battery with a dangerous weapon." The court also stated, "I don't know how you could ever get probation in a court without having been arrested."

Although the court's inference may be reasonable, courts "must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines." *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir.1993). On the record before us, too much speculation was required. The printout does not itself suffice as "reliable and specific" proof that Cataldo was arrested on the 1983 charge, in the face of Cataldo's assertion that the charge involved a notice to appear.[11] The printout is inconclusive on whether Cataldo was arrested. On appeal, the Government does not contend that the printout is direct evidence of an arrest or that it contains information about an arrest which would disprove Cataldo's assertion that the 1983 charge was handled by a notice to appear. The Government never obtained Massachusetts court documents verifying Cataldo's alleged arrest or presented evidence showing that it was more likely than not that the charges against Cataldo involved an arrest. *See United States v. Bernardine*, 73 F.3d 1078, 1082

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[11] Cataldo's claim is plausible: Massachusetts law, at least at the present time, indicates a preference for summonses over arrest warrants. *See* Mass. Gen. Laws Ch. 276, § 24 (1998) ("Upon a complaint or indictment for any offense, a summons shall issue instead of a warrant, unless, in the judgment of the court or justice, there is reason to believe that the defendant will not appear upon summons.").

(11th Cir.1996) (vacating sentence and noting absence of evidence in record to clarify ambiguous statement relied upon by Government in seeking enhancement to defendant's sentence).

We therefore conclude that the Government failed to establish that it was more likely than not that Cataldo was arrested for the 1983 charge.[12] That fact is an essential predicate to the application of the enhancement. Without it, the court had no basis on which to conclude that Cataldo gave inaccurate information, that is, that he obstructed justice.[13]

In the light of Cataldo's objection and the absence of "reliable and specific" evidence to the contrary, the court

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[12] Our opinion bears only on the obstruction-of-justice enhancement. On appeal, Cataldo does not challenge the assessment of one criminal-history point for the 1983 offense; therefore, we do not address that issue.

[13] The basis of the enhancement appears to be the 1983 charge and that is the focus of the parties' arguments on appeal. But, Cataldo was also convicted in 1963 for assault and battery on a police officer in Massachusetts, as well as six other offenses in Massachusetts. Cataldo objected to all these charges too, asserting that the Government had not proven he was arrested. The district court did mention the 1963 charge in ruling on the obstruction-of-justice enhancement. No computer printout evidences the 1963 charge, but the PSI indicates that Cataldo received three months' probation on that charge. The court, drawing the same inference he did for the 1983 offense, concluded that Cataldo had been arrested. To the extent that the court alternatively or additionally relied on the 1963 charge or the other Massachusetts charges, that act was in error for reasons discussed above about the 1983 charge: the Government failed to prove that Cataldo had been arrested.

erred in applying the enhancement. Accordingly, we must vacate the sentences and remand for resentencing.

For these reasons, we AFFIRM Cataldo's convictions, but we VACATE his sentences and REMAND for resentencing.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

United States District Court

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V

JOSEPH CATALDO
Marshal #30855-004

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Sep. 1, 1997)

Case Number:
96-6011-CR-ROETTGER-1
A.U.S.A.-Lanigan
Alan S. Ross, Esq.
2250 S.W. 3rd Ave.,
4th Floor
Miami, FL 33129-2095
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[XX] was found guilty on count(s) 1 & 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21;963	Conspiracy to import cocaine.	1/17/96	1
21;841(a)	Possession w/intent to distribute cocaine.	1/17/96	4

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[XX] The defendant has been found not guilty on count(s) 2 & 3 and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[XX] It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) 1 & 4, which shall be due [XX] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 033-28-7002

Defendant's Date of Birth: 2/8/39

Defendant's Mailing Address:

3301 N.E. 57th Court

Ft. Lauderdale, FL

Defendant's Residence Address:

August 22, 1997
Date of Imposition of Sentence

/s/ Norman C. Roettger
Signature of Judicial Officer

NORMAN C. ROETTGER
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

16 Sept. 1997
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 108 months as to each Count 1 & 4 to run concurrently with each other.

___ The court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at ___ a.m. / p.m. on _____.
___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____ .

___ as notified by the United States marshal.

___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[XX] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XXX] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5509

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH CATALDO,

Defendant-Appellant.

(Filed May 18, 1999)

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: TJOFLAT and EDMONDSON, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Joseph Cataldo is DENIED.

ENTERED FOR THE COURT:

/s/ J. Edmondson
UNITED STATES CIRCUIT JUDGE